

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate	)	WC Docket No. 02-112
Affiliate and Related Requirements	)	

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

Praveen Goyal  
Senior Counsel for Government  
and Regulatory Affairs  
[pgoyal@covad.com](mailto:pgoyal@covad.com)

Covad Communications Company  
600 14th Street, N.W., Suite 750  
Washington, D.C. 20005  
202-220-0400 (voice)  
202-220-0401 (fax)

Covad Communications Company (“Covad”), by its counsel, hereby files its reply in the above-referenced proceeding to comments filed in response to the Commission’s Notice of Proposed Rulemaking regarding the sunset of statutory requirements under Section 272 imposed on the Bell Operating Companies (“BOCs”) providing in-region interLATA services.<sup>1</sup> Covad shares the concerns that have been voiced by several commenters that removal of the requirements in Section 272 would enable BOCs to discriminate more easily against competitors, in both local exchange and interexchange markets. As the last remaining national provider of competitive broadband xDSL services, Covad is acutely aware of the dangers involved in removing section 272 affiliate requirements from the BOCs. Covad submits that, if the Commission chooses nonetheless to proceed with this ill-advised approach, it should do so only after developing national performance metrics and imposing national performance standards for the ILEC provision of UNEs to competitors.

The Commission appears to be moving under the understanding that, after a BOC has received section 271 authorization, and purportedly made the requisite statutory showing that its local markets are open to competition, there will eventually remain little need for maintaining the separate affiliate structure required under section 272. Indeed, the fact that section 272 includes a sunset provision in its terms lends some credence to this view. The Commission must also remember, however, that section 272 calls for the Commission to exercise its independent judgment to determine whether the need for maintaining a separate affiliate requirement remains. The Commission must not take this responsibility lightly. The fact that Congress called for the Commission to exercise such

---

<sup>1</sup> Notice of Proposed Rulemaking, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC 02-112 (rel. May 24, 2002) (“NPRM”).

authority indicates that Congress clearly foresaw the dangers inherent in allowing incumbent monopolists to enter competitive interLATA markets and vertically integrate their historically monopoly services with competitive interLATA voice and data services.

Sadly, the need for a mandatory separate affiliate structure under section 272 has not disappeared – particularly for BOCs obtaining section 271 authority to provide in-region interLATA service. In fact, if past BOC behavior is any indication, 271 interLATA entry hardly stifles the BOCs' incentives to backslide by engaging in discriminatory and anticompetitive behavior. If anything, 271 authority only raises the stakes of discrimination, allowing a BOC to reap even greater financial rewards when it impedes competitive entry into its local markets while leveraging its local monopoly vertically in competitive interLATA markets.<sup>2</sup>

Section 272 provides a valuable bulwark against the continuing abuse of that monopoly power. Section 272's separate affiliate requirements allow the Commission and the public, when these requirements are effectively enforced,<sup>3</sup> to scrutinize the terms on which the BOCs deal with their separate affiliates. Excessively favorable terms serve

---

<sup>2</sup> For a sampling of such behavior, see *Bell Atlantic-New York Authorization under Section 271 of the Communications Act to Provide In-Region, Interlata Service in the State of New York*, Order, File No. EB-00-IH-0085, 15 FCC Rcd. 5413, FCC 00-92 (rel. Mar. 9, 2000) (consent decree requiring Verizon to pay \$3,000,000 to U.S. Treasury due to its post-271 treatment of electronic CLEC orders in New York); "FCC Proposes To Fine SBC Communications, Inc. \$2.52 Million", New Release, Oct. 16, 2001 (SBC's filing of inaccurate information in the Kansas/Oklahoma section 271 proceeding), available at [http://www.fcc.gov/eb/News\\_Releases/nrsbc1016.html](http://www.fcc.gov/eb/News_Releases/nrsbc1016.html); "Enforcement Bureau And Verizon Enter Into \$250,000 Consent Decree Regarding Long Distance Verification And Record Retention," News Release, Oct. 17, 2000, (Verizon failed to comply with rules regarding data retention of customer records), available at [http://www.fcc.gov/eb/News\\_Releases/nrverizon.html](http://www.fcc.gov/eb/News_Releases/nrverizon.html).

<sup>3</sup> Sadly, the Commission continues to allow the BOCs to flout the nondiscrimination safeguards in section 272 through their heavily redacted audit reports. The Commission has yet to act on AT&T's request that SBC file publicly an unredacted version of its Section 272 Biennial Audit Report. See Letter from Aryeh S. Friedman, Senior Attorney, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, February 12, 2002. In the absence of effective 272 enforcement by the Commission, the BOCs will have unrestricted ability to hide their discrimination against competitors in favor of their own affiliates.

as an immediate indication of residual discrimination in the local exchange marketplace, as well as the unfair vertical exercise of market power in competitive interLATA markets. Without an effectively enforced section 272 regime, the Commission and the public will simply be left in the dark as to whether those BOCs with 271 authority continue to engage in monopolistic behavior, in spite of their having the greatest of incentives to do exactly that post-interLATA entry. If past behavior is any indication, there is little reason for the Commission to limit its own ability to shed light on the discriminatory practices of the BOCs.

If, in spite of all these dangers, the Commission decides nonetheless to continue on its ill-advised course, Covad submits that the Commission should only allow 272 requirements to sunset after developing national performance metrics and imposing national performance standards for the ILEC provision of UNEs to competitors. Although the Commission ideally would utilize both the section 272 requirements and federally imposed national performance standards to restrain incumbents from discriminating against their competitors, the Commission must not eliminate one of the Act's protections against incumbent discrimination without at least developing a backstop. For all of the reasons Covad sets forth in its filings, the Commission should immediately develop and impose the national UNE performance metrics and standards Covad submits in the *UNE Performance Metrics NPRM* proceeding. If the Commission decides to allow section 272's separate affiliate requirements to sunset, the need for these federally imposed and enforced performance standards becomes all the more imperative. Covad respectfully submits that the Commission must not allow section 272 requirements to sunset without at least adopting the UNE performance standards Covad proposes.

## **Conclusion**

Covad urges the Commission not to allow Section 272 provisions to sunset after the 3-year period provided in Section 272(f)(1). However, if the Commission decides to allow these structural and nondiscrimination safeguards to sunset, it must immediately adopt and impose the UNE performance metrics and standards Covad proposes in its filings in the *UNE Performance Metrics NPRM* proceeding.

Respectfully submitted,

/s/ Praveen Goyal

Praveen Goyal  
Senior Counsel for Government  
and Regulatory Affairs

Covad Communications Company  
600 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20005  
202-220-0400 (voice)  
202-220-0401 (fax)

5 August 2002